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OFFICE OF PETITIONS

In re Application of
Gianpiero Mastinu et al
Application No. 10/565,338
Filed: January 19, 2006
Attorney Docket No. 163-679

DECISION ON PETITION

This is a decision on the petition, filed January 21, 2009, which is being treated as a petition under 37 CFR 1.181 (no fee) requesting withdrawal of the holding of abandonment in the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision should be filed within two (2) months from the mail date of this decision. *Note* 37 CFR 1.181(f). The request for reconsideration should include a cover letter and be entitled as a "Renewed Petition under 37 CFR 1.181 to Withdraw the Holding of Abandonment."

This application was held abandoned for failure to reply in a timely manner to the nonfinal Office action mailed December 31, 2007 and on May 16, 2008. A Notice of Abandonment was mailed on January 9, 2009.

Petitioner asserts that the Notice of Non-Compliant Amendment mailed May 16, 2008 was not received.

A review of the written record indicates no irregularity in the mailing of the Office action, and, in the absence of any irregularity, there is a strong presumption that the Office action was properly mailed to the practitioner at the address of record. This presumption may be overcome by a showing that the Office notice was not in fact received. In this regard, the showing required to establish the failure to receive the Office action must consist of the following:

1. a statement from practitioner stating that the Office action was not received by the practitioner;
2. a statement from the practitioner attesting to the fact that a search of the file jacket and docket records indicates that the Office action was not received; and
3. a copy of the docket record where the nonreceived Office action would have been entered had it been received must be attached to and referenced in the practitioner's statement.

See MPEP § 711.03(c) under subheading "Petition to Withdraw Holding of Abandonment Based on Failure to Receive Office Action," and "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 Official Gazette 53 (November 16, 1993).

The petition fails to satisfy item (2). Petitioner provided no evidence to indicate a search of the file jacket.

Accordingly, absent the required evidence to establish nonreceipt of the Office action of May 16, 2008, the petition requesting withdrawal of the holding of abandonment cannot be granted at this time.

If petitioner cannot supply the evidence necessary to withdraw the holding of abandonment, or simply does not wish to, petitioner should consider filing a petition under 37 CFR 1.137(b) stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of the issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the \$1,620.00 petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

It is noted that petitioner filed the instant petition with the heading "Petition To Revive Under 37 CFR 1.137(b)," and also, mentioned that the abandonment was unavoidable. However, no fee

for a petition was provided. Therefore, in view of the body of the petition and no fee submitted, the petition is being construed as a petition to withdraw holding of abandonment under 37 CFR 1.181 (no fee).

Further correspondence with respect to this matter should be addressed as follows:

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By hand: U. S. Patent and Trademark Office
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 Alexandria, VA 22314

By facsimile: **(571) 273-8300**
 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3208.


Karen Creasy
Petitions Examiner
Office of Petitions